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In the Supreme Court of the United States

OCTOBER TERM, 1977

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BRUCE W. WADSWORTH, ADMINISTRATOR OF NEW HAMPSHIRE EMPLOYERS' BENEFIT TRUST AND NORTHERN NEW ENGLAND BENEFIT TRUST

PETITIONER,

v.

FRANCIS E. WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE, STATE OF NEW HAMPSHIRE

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENT.

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The Petitioner Bruce W. Wadsworth respectfully prays that a writ of certiorari issue to review the judgment nd opinon of the United States Court of Appeals for the First Circuit entered in this proceeding on September 1, 1977.

Decisions Below

The unreported decision of the United States District Court for the District of New Hampshire (No. 76-226, Feb. 11, 1976) is appended hereto at page 39. The decision of the United States Court of Appeals for the First Circuit, Nos. 77-1135 and 77-1136, Sept. 1, 1977, is reported at 562 F.2d 70 and is appended at page 22.

Jurisdiction

The judgment of the court below was entered on September 1, 1977. This petition is timely filed under Supreme Court Rule 22.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. When an employee benefit plan providing benefits in part through the purchase of group insurance is regulated by the provisions of the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.*, does that Act pre-empt Chapter 57 of the New Hampshire Laws of 1976, which requires group insurers to provide first-dollar coverage for mental illness not otherwise provided by the Plan?

2. Is Chapter 57, as it is made to apply to group insurance purchased to provide benefits under a health and welfare plan which is the product of collective bargaining, pre-empted by §302 of the National Labor Relations Act, 29 U.S.C. §186(c)(5)?

3. Has the State of New Hampshire, by requiring a benefit plan covering employees in many states to provide benefits required by Chapter 57 to employees resident and employed in that state, placed an impermissible burden on interstate commerce in contravention of Art. I, §8 of the United States Constitution?

4. Does Chapter 57, by favoring group insurance supplied by Blue Cross-Blue Shield, deprive petitioners of the equal protection of the laws in contravention of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The relevant Constitutional and statutory provisions involved herein are set out at page 50 *infra*.

Statement of the Case

The Factual Background

Petitioner, Plaintiff-Appellant below, is the administrator of certain employee benefit plans created by collectively bargained agreements or established by employer groups as part of their labor benefit programs. The requirements of the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (hereinafter "ERISA"), govern the plans and Petitioner as the fund administrator.

The court below described the operation of the benefit plans as follows:

> The funds administered by plaintiffs are employee welfare benefit plans within the meaning of §3 of ERISA.[1] All of the funds, with the exception of New Hampshire Employer's [sic] Benefit Trust, are "Taft-Hartley Trusts" in that they are also regulated by §302 of the Labor Management Relations Act.[2] Also with the exception of New Hampshire Em-Employer's [sic] Benefit Trust, which is voluntarily

[1] 29 U.S.C. §1002(1).
[2] 29 U.S.C. §186(c).

operated by employees, the funds are the products of collective bargaining agreements that require employers to contribute at a specified level. While the level of contributions is specified by the collective bargaining agreements, benefits are not.

Each year the fund administrators meet with local unions to determine the types of coverage desired by the members. The fund administrators must obtain, at the least possible cost, the coverage chosen. To fulfill this obligation the fund administrators, with the aid of insurance consultants, put together packages upon which they request sealed bids from insurance companies. Although the funds are self-insurers on a few benefits, approximately 90 per cent of the benefits are provided through group insurance policies. However, for all practical purposes, under the group insurance policies the funds are self-insurers who retain the insurance companies to provide the administrative service of processing claims.[3] Because the premiums are experience rated the amount of claims for the year is projected; if the actual amount of claims is higher than the projection, the premium is adjusted upward; if the actual amount of claims is lower than the projection, the premium is adjusted downward.

[3] In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Supreme Court made a similar observation concerning General Electric's "Weekly Sickness and Accident Insurance Plan:"

> With respect to the Plan, General Electric is, in effect, a self-insurer. While General Electric has obtained, for employees outside California, an insurance policy from the Metropolitan Life Insurance Company, this policy involves the payment of a tentative premium only, subject to adjustment in the light of actual experience. Pretrial Stipulation of Facts, 11. In effect, therefore, the Metropolitan Life Insurance Company is used to provide the administrative service of processing claims, while General Electric remains, for all practical purposes, a self-insurer.

429 U.S. at 129 n. 3 [footnote by the Court.]

> So in the long run, the funds reimburse the insurance company for all claims.

562 F.2d 74-75 [Footnotes by the court, renumbered.]

Francis E. Whaland, Defendant-Appellee below, is Commissioner of Insurance for the State of New Hampshire. As such, he is charged with administering Chapter 57 of the Laws of 1976, N.H. Rev. Stat. Ann. §415: 18-a(I) (1976) (hereinafter "Chapter 57"). In relevant part, Chapter 57 provides that:

> Each insurer that issues or renews any policy of group or blanket accident or health insurance providing benefits for medical or hospital expenses, shall provide to each group, or to the portion of each group comprised of certificate holders of such insurance who are residents of this state and whose principal place of employment is in this state, coverage for expenses arising from the treatment of mental illnesses and emotional disorders . . . .

At the time this law was enacted, Petitioner was concerned (a) that Chapter 57 would necessitate disparate treatment of New Hampshire beneficiaries and those resident in other states, (b) that the statute mandates certain benefits which had not been agreed upon by the administrators and the unions, (c) that the statute unfairly discriminates in favor of Blue Cross-Blue Shield plans and against Petitioner's plans[4] and (d) that the enactment of

[4] This concern was aroused by Chapter 57:2 (iv), New Hampshire Laws of 1976, which reads:

> In the case of care and services rendered by licensed general hospitals, public or licensed mental hospitals, or community mental health concerns which have not entered into a written contract with the hospital service corporation for the rendering of such care and services to its subscribers, benefits of not less than 75 percent of the benefits enumerated in paragraphs I, II and III shall be provided.

ERISA had precluded the application of Chapter 57 to the plans involved herein. Shortly after the effective date of Chapter 57, therefore, Petitioner Wadsworth sought a declaration from Commissioner Whaland that Chapter 57 does not affect the plans administered by Wadsworth. Receiving no response from Commissioner Whaland, Petitioner Wadsworth and James M. Dawson,[5] on behalf of the employee benefit plans administered by them, commenced actions in the United States District Court for the District of New Hampshire against Commissioner Whaland, seeking a Declaratory Judgment and injunctive relief prohibiting the application of Chapter 57 to the employee benefit plans administered by the Plaintiffs.

On December 22 and 23, 1976, an evidentiary hearing was held by the District Court. All parties submitted appropriate motions for summary judgment with supporting affidavits. By decision dated February 11, 1977, the District Court granted summary judgment in favor of the Defendant, holding that Chapter 57 is constitutional and is not pre-empted by ERISA.

Wadsworth and Dawson seasonably appealed the decision to the Court of Appeals for the Second Circuit, which consolidated the two cases. That court affirmed the judgment of the District Court.

The Opinions Below:

The District Court, by Hugh H. Bownes, J., held that ERISA does not pre-empt Chapter 57. Despite the language of Section 514 of that Act, 29 U.S.C. §1144(a), which states that

> the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .,

[5] Dawson administers employee benefit funds substantially identical to those administered by Petitioner Wadsworth.

and despite Congress' definition of "employee welfare benefit plan" in 29 U.S.C. §1002(1) as including plans which operate "through the purchase of insurance or otherwise," the court declared the exception contained in 29 U.S.C. §1144 (b) (2) (A) to be controlling. That subsection reads:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

Subparagraph (B), referred to in the foregoing language, creates a further qualification:

> Neither an employee benefit plan . . ., nor any trust established under such plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company, or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. 29 U.S.C. §1144(b) (2) (B).

Holding that this language means merely that "states may not regulate employee benefit plans by calling them insurance companies" (Slip Op. at 10), and relying on the broad savings clause of the McCarran-Ferguson Act, 15 U.S.C. §1012(B), the District Court found in ERISA no intent to pre-empt Chapter 57. It summarily dismissed Petitioner's other claims as well.

The Court of Appeals, affirming, rendered a more complex opinion. At the outset, it stated that:

> The issue is whether employee welfare plans are insurers under [Chapter 57]. In the event they are, we would have no difficulty finding explicit pre-emption by ERISA notwithstanding the saving clause [29 U.S.C. §1144(b) (2) (A), *supra*]."
> 562 F.2d at 76 [footnote omitted].

As noted earlier, the court found that "for all practical purposes" the plans are self-insurers; nevertheless, it held that ERISA does not pre-empt Chapter 57, and that Chapter 57 does not purport "to directly regulate employee welfare plans as insurers." 562 F.2d at 76.[6]

The Court agreed with the Petitioner's alternative contention that Chapter 57 does regulate the plans indirectly, by controlling the content of the policies written and issued. Even so, it refused to find pre-emption by ERISA. Construing the savings clause together with the "deemer" clause and the McCarran-Ferguson Act, the Court found no "clear statement of intent" that Congress meant to forbid State legislation which affects employee benefit plans but only indirectly. The Court summarily affirmed the District Court's disposition of Petitioner's claims of pre-emption by the National Labor Relations Act, and of violations of the Commerce and Equal Protection Clauses.

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[6] One possible interpretation of this aspect of the decision is that ERISA pre-empts state regulation when, and only to the extent that, the benefit funds are self-insurers. If that is so, Petitioner would appear to be able to declare that the funds are self-insurers for particular benefits, such as treatment for mental illness, and, as such, provide only the coverage originally bargained for by the administrators and the unions. Under the logic of the opinion below, such a self-insurance program is exempt from state regulation, even though Chapter 57 expressly requires more extensive coverage. This anomalous result emphasizes the inconsistency in approach and policy which exists in this area and which the court below evidently approved.

Jurisdiction of the Courts Below

The District Court's jurisdiction was invoked under 28 U.S.C. §§1331 and 1343(3). Appellate jurisdiction lay in the Court of Appeals under 28 U.S.C. §1291.

Reasons for Granting the Writ

I. The Case Presents An Important Question of Federal Law That Requires Resolution By This Court.

A. *The Congressional Intention to Pre-empt State Regulation in This Field Was Clearly Expressed.*

1. *The Legislative History.*

The pre-emptive section of ERISA, with its two qualifying subparagraphs, has been set out above. In interpreting the Congressional intent, it is instructive to examine the earlier versions of the section. That examination reveals that the law as enacted contains a broader pre-emption provision than those originally proposed.

The Senate Committee on Labor and Public Welfare stated its early position thus:

> Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.[7]

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[7] S. Rep. No. 127, 93d Cong., 1st Sess. (1973), at 35.

From this original and limited aim, the pre-emptive provision grew in scope. The Senate adopted a provision stating that ERISA is to pre-empt State laws only insofar as those laws "relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act," with exceptions for State laws regulating insurance, banking, securities, and employee benefit plans not subject to ERISA. H.R.2, 93d Cong., 2d Sess. Sec. 699(a) (1974) (as amended by the Senate).

The House of Representatives, with exceptions either similar to those of the Senate or not relevant here, provided that ERISA should supersede all State laws

> insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan. . . . H.R. 12906, 93d Cong., 2d Sess. Sec. 514 (1974).

Thus the bills which went to the conference committee limited pre-emption to state regulation of specific matters detailed in ERISA.

The conference committee expanded the pre-emption clause to its present scope: ERISA was to pre-empt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. §1144 (a). In its accompanying report, the conference committee explained the provision as follows:

> Under [ERISA] the provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. 1974 U.S. CODE CONG. & AD. NEWS 5162.

When the revised pre-emption clause was presented to the full membership of Congress, it was explained in language equally broad. Senator Jacob Javits, one of the managers of the bill,[8] stated:

> Both House and Senate bills provided for preemption of State law but . . defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on such Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare . . . benefit plans not clearly connected to the Federal regulatory scheme.
>
> . . . [T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs. 120 *Cong. Rec.* 29,942 (1974)

Congressman John Dent, Chairman of the Subcommittee on Labor, House Labor and Education Committee, explained the revised pre-emption clause to the House:

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection af-

[8] This Court has recognized that weighty consideration is to be given to comments made by the managers of a bill and by members of committees which have dealt extensively with it. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 (1973).

> forded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan. . . . 120 *Cong. Rec.* 29,197 (1974).

The Chairman of the Senate Committee of Labor and Public Welfare, Senator Harrison Williams, Jr., made similar remarks:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. 120 *Cong. Rec.* 29,933 (1974).

As Senator Williams noted, there are "narrow exceptions" to the pre-emption clause. Those which appear on the face of the clause are these: pre-emption does not apply to transactions occurring prior to the effective date of ERISA; pre-emption does not prohibit cooperation between the federal government and state agencies; and there is no pre-emption of generally applicable state criminal laws.

Beyond this, the sweeping clause is subject to the language of later subparagraphs. By 29 U.S.C. §1144(b) (2) (A), Congress provided that ERISA was not to

> relieve any person from any law of any State which regulates insurance, banking or securities.

Subparagraph (B) of this section qualifies this provision by stating that "an employee benefit Plan" like those involved herein shall not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts. . . ." Congress expressly recognized that the plans might function "by the purchase of insurance or otherwise", thus including self-insurers as well as purchasers from outside insurance carriers. 29 U.S.C. §1002(1). Finally, ERISA defined the term "State" to include agencies "which purport to regulate, directly or indirectly, the terms and conditions of employee benefit plans . . ." 29 U.S.C. §1144(c).

Petitioner Wadsworth has argued below that, taken as a whole, and viewed in the context of the legislative history, these provisions clearly demonstrate Congress' intention to supersede laws like New Hampshire's Chapter 57. This position is supported by a recent statement of the House Committee charged with the oversight of ERISA:

> It is our understanding of [the language of the pre-emption section] that with respect to regulation of the activities of certain employee benefit plans (those subject to ERISA jurisdiction), federal authority has been expressly extended to occupy the field to the exclusion of state authority subject to certain exceptions. These exceptions are designed to delin-

eate affirmatively the limits of the "field" preempted by section 514(a), and articulate a second, but distinctly subordinate, policy within the section of preserving state authority insofar as it does not relate to any plan ". . . described in section 4(a) and not exempt under section 4(b)."

Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field pre-empted. Similarly it is our belief that the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded. Activity Report of the Committee on Education and Labor of the U.S. House of Representatives, H.R. Rep. No. 94-1785, p. 47, 94th Cong., 2d Sess. (1977).

The rejection of Petitioner's argument by the courts below raises a serious question concerning the scope of the Federal law and the intentions of Congress. That question needs resolution by this Court. *Donaldson* v. *United States*, 400 U.S. 517 (1971).

2. *Administrative Interpretations*

The Department of Labor, which is charged with administering ERISA, has made plain its opinion that the statute pre-empts laws like Chapter 57. In a letter to the California Commissioner of Corporations, for example, the Department's Administrator of Pension and Welfare Benefit Programs advised that a California statute mandating certain coverage was pre-empted by ERISA. The Administrator wrote:

> The effect of this section is to preempt all state laws which *relate to* employee benefit plans subject to the coverage of Title I of ERISA (Protection of Employee Benefit Rights), whether such state laws conflict with the terms of the federal legislation or would merely supplement the federal scheme.
>
> The major reasons for broad pre-emption . . . include (1) the need to prevent conflicting regulations over interstate plans, (2) the desire to avoid the litigation that would result from piecemeal preemption, (3) the emergence of a pervasive Federal interest in employee benefit plans, and (4) the existence of a comprehensive federal program for future study (see §3022). C.C.H. *Pension Plan Guide* ¶23,472 (July 14, 1976).

The Office of Employee Benefits Security, in Opinion Letter 75-22, expressed the view that Hawaii's Prepaid Health Care Act, which purported to regulate employee benefit plans, had been superseded by ERISA. *Id.* at ¶25,136. And in ERISA Opinion Letter 75-143, the Department stated:

> State laws governing employee benefit plans are pre-empted by ERISA insofar as coverage extends to any fund established by one or more employers to provide employees, their families or dependents with medical, hospital, disability, death, retirement or annuity benefits. *Id.* at ¶25,145

These interpretations are entitled to "great deference" from the courts. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971). The courts below made no reference to them.

B. *The States Continue to Regulate Benefit Plans Covered by ERISA.*

The questions proposed to this Court for review are particularly pressing in view of the thicket of state laws which, despite the pre-emption clause, purport to regulate benefit plans which are subject to regulation under ERISA. In the area of mandatory benefits alone, as the chart appended hereto at page 53 shows, state laws are proliferating rapidly; almost all of the legislation noted on the chart was enacted after January 1, 1975, the effective date of ERISA.

There is of course no question that states may pass laws regulating the "business of insurance". *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969). It is equally clear that no Act of Congress shall be construed to supersede state laws regulating the "business of insurance" unless that Act specifically relates to the business of insurance. The McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.*

What is problematic in this case is the extent to which ERISA, as an act covering employee benefit plans, relates specifically to the business of insurance and therefore supersedes state regulation.

Some commentators have no doubt that state laws are preempted:

> Giving the McCarran Act maximum effect, it is only necessary to ask whether ERISA satisfies the McCarran Act requirement that federal laws "specifically relate to the business of insurance." The requirement is not that ERISA use the words "insurance business"; it is that it "relate" to the business of insurance. To the extent that ERISA affects that portion of the "insurance business" that overlaps

> "employee benefit funds" when it states that a certain activity is not to be "deemed", that is, "treated as," an insurance business for state insurance law purposes, it does explicitly relate to the business of (employee benefit) insurance; that is its purpose. We conclude that the McCarran Act does not preclude supersession of state law by ERISA in this way. Pfennigstorf and Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation,* 3 A.B.F. Res. J. 787, 828-9 (1976).

Others are not convinced; see, *e.g.,* Okin, *Federal Preemption of State Law under ERISA: An Examination of the Effects of the Federal Mandate in the Light of Authoritative Precedent Under the Supremacy Clause, the McCarran-Ferguson Act and the Legislative History,* XXIV Proc. Assoc. Life Ins. Counsel 115 (1976); Brummond, *Federal Preemption of State Insurance Regulation Under ERISA,* 62 Iowa L.Rev. 57 (1976).

This lack of clarity, coupled with burgeoning state regulation, has placed the Petitioner, and presumably other plan administrators, in a position of great uncertainty. On the one hand, he is responsible as a fiduciary[9] for managing a benefit plan which has been arrived at by negotiation with representatives of the beneficaries; on the other, he may be subject to laws like New Hampshire's Chapter 57, which require the plan to extend certain coverage at additional and unplanned expense. Under Chapter 57, this coverage — which was not bargained for by the parties — must be extended to some of the plan beneficiaries; and, to avoid discrimination prohibited by the National Labor Relations Act, 29 U.S.C. §186(c) (5), extension to all of the beneficiaries may perhaps be necessary. The present

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[9] 29 U.S.C. §1101 *et seq.*

nationwide conflict between state regulators and the Department of Labor places the federally-regulated fund administrator in the position of obeying two antipathetic masters. Petitioner asks this Court to settle the conflict by declaring which master shall prevail.

II. The Courts of Appeal and the District Courts Have Reached Conflicting Results On the Question of Pre-Emption.

As suggested above, the confusion over Federal and state regulation has left Petitioner in doubt as to his legal obligations, and threatens the fiscal life of the plans. Disagreement among the Courts of Appeal has compounded this doubt. Moreover, since beneficiaries of the plans administered by Petitioner live, work, and are provided health care in several states and in two Circuits which have disagreed, the Petitioner encounters legal requirements which are impossible to reconcile without this Court's clarification.

The opinion of the First Circuit Court of Appeals in this case holds that New Hampshire's law is not pre-empted by ERISA. As noted above, the language of the opinion suggests that there are circumstances in which ERISA might pre-empt; but those circumstances are not defined with enough precision to guide the Petitioner in conforming his conduct to the law.

The Second Circuit has reached a result contrary to that of the court below in this case. In *Marshall* v. *Chase Manhattan Bank* (*National Association*), 558 F.2d 680 (2d Cir. 1976), the Court reversed the District Court's judgment dismissing a suit by the Secretary of Labor. The Secretary had sued for injunctive and declaratory relief to prevent the Defendant from invoking state court jurisdiction over the termination of an employee benefit plan,

including an accounting for the period after ERISA's effective date of January 1, 1975. Chase contended that since the employer became bankrupt in 1974 ERISA did not govern and the case was properly before the State courts.

The Court of Appeals agreed with the Secretary that the federal court was the proper forum:

> The superior federal interest sought to be vindicated here is clear from §§502 and 514 of [ERISA] as well as its legislative history which establishes the congressional intent that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent regulation. 558 F.2d at 683.

As support for that conclusion, the Court cited the remarks of Congressman Dent quoted above.

Thus the Second Circuit has evidently read the pre-emption clause as having a very broad scope. The First Circuit, in its decision in this case, has read the clause far more narrowly. The conflict in interpretation in two neighboring Circuits makes review by the Court appropriate. *Bingler* v. *Johnson,* 394 U.S. 741 (1969).

The lower courts which have considered the matter are also divided. In *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.,* 426 F. Supp. 316 (N.D. Ind. 1977), the court held that ERISA pre-empted an Indiana law mandating continued coverage of disabled dependents, saying:

> Since the court concludes that the benefit plan here is a covered federal plan, the court is led also to the conclusion that no state statute, regulation, or common law rule, operating of its own force, may govern any aspect of this case. 426 F. Supp. at 321 [Footnote omitted.]

Similarly, in *Kerbow* v. *Kerbow,* 421 F. Supp. 1253, 1260 (N.D. Tex. 1975), the court concluded that "Congress intended the Act to supersede any and all state laws regulating employee benefit plans." *Accord*: *Azzaro* v. *Harnett,* 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.* 553 F.2d 93 (2d Cir.), *cert. denied* 46 U.S.L.W. 3200 (Oct. 4, 1977).

Most recently, in *Bell* v. *Employee Security Benefit Association,* No. 77-4066 (D.Kan., August 22, 1977), the court explicitly rejected the reasoning of the District Court in this case and adopted the language of the decision in *Hewlett-Packard Company* v. *Barnes,* 425 F. Supp. 1294, 1300 (N.D. Cal. 1977):

> Overall, the legislative history reveals both that Congress carefully considered the question of pre-emption, including the feasibility of enacting a more limited pre-emption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily pre-empting state regulation of ERISA-covered employee benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supersede state regulation of benefit plans such as plaintiffs' is indisputable.

In sharp contrast to these decisions in the district courts, Judge Bownes' opinion in this case focused on the savings clause and held that ERISA does not pre-empt the New Hampshire statute. *See also Insurers' Action Council* v. *Heaton,* 423 F. Supp. 921 (D. Minn. 1976).

In sum, then, the Federal courts conflict on this issue; the conflict produces uncertainty among those who, like the Petitioner, are subject to differing interpretations in different areas; and the interpretation given by the Court

below requires expenditures, both unbargained and unplanned, which threaten the plans with fiscal disaster. Guidance from this Court, therefore, is urgently needed.

Conclusion

For all of the foregoing reasons, Petitioner Wadsworth respectfully requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 77-1135

BRUCE W. WADSWORTH, ADMINISTRATOR OF NEW HAMPSHIRE EMPLOYERS' BENEFIT TRUST AND NORTHERN NEW ENGLAND BENEFIT TRUST

APPELLANT,

v.

FRANCIS E. WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE, STATE OF NEW HAMPSHIRE

APPELLEE.

No. 77-1136

JAMES M. DAWSON, ADMINISTRATOR OF NORTHERN NEW ENGLAND CARPENTERS HEALTH AND WELFARE FUND, NEW HAMPSHIRE MASONS HEALTH AND WELFARE FUND, NEW HAMPSHIRE PLUMBERS HEALTH AND WELFARE FUND, NEW HAMPSHIRE SHEET METAL WORKERS #297 HEALTH AND WELFARE FUND

APPELLANT,

v.

FRANCIS E. WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE, STATE OF NEW HAMPSHIRE

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[HON. HUGH H. BOWNES, *United States District Judge*]

Before COFFIN, *Chief Judge*,
LAY, *Circuit Judge**,
CAMPBELL, *Circuit Judge*.

David L. Nixon, with whom *Randolph J. Reis* and *Brown and Nixon Professional Association* were on brief, for James M. Dawson etc., appellant.

John J. Flaherty, with whom *Peter H. Rysman* and *Preti & Flaherty* were on brief, for Bruce W. Wadsworth, appellant.

George J. Pantos, Michael J. Bartlett, Vedder, Price, Kaufman, Kammholz & Day and *Robert S. Stone* on brief, for Erisa Industry Committee, amicus curiae.

James C. Sargent, Jr., Assistant Attorney General, with whom *David H. Souter*, Attorney General, and *Andrew R. Grainger*, Attorney, were on brief, for appellees.

Warren Spannaus, Attorney General, *Richard B. Allyn*, Solicitor General, *Richard A. Lockridge*, and *Stephen Shakman*, Special Assistant Attorneys General, on brief for the State of Minnesota, amicus curiae.

September 1, 1977

LAY, *Circuit Judge*. This case presents an important and fundamental question of federal preemption because of an alleged conflict between the Employee Retirement Income Scurity Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and the New Hampshire state law regulating the content of group insurance policies, Chapter 57 of the Laws of 1976, N.H. Rev. Stat. Ann. §§ 415:18-a, 419:5-a and 420:5-a (1976) Chapter 57 requires the "issuers" of group health insurance policies to provide coverage for the treatment of mental illnesses and emotional disorders.[1] ERISA does

* Of the Eighth Circuit, sitting by designation.

[1] *Each insurer that issues or renews any policy* of group or blanket accident or health insurance providing benefits for medical or hospital expenses, shall provide to each group, or to the portion of each group comprised of certificate holders of such insurance who are residents of this state and whose principal place of employment is in this state, coverage for expenses arising from the treatment of mental illnesses and emotional disorders . . . .

N.H. Rev. Stat. Ann. § 415:18-a(I) (1976) (emphasis added).

not require this. Administrators of various health and welfare funds which provide benefits chiefly through the purchase of group health insurance,[2] brought this action against Francis E. Whaland, Commissioner of Insurance for the State of New Hampshire, seeking a declaration that Chapter 57 is unconstitutional and an injunction restraining its enforcement. The fund administrators' principal contention is that ERISA preempts the provisions of Chapter 57, to the extent that that chapter applies to employee benefit plans.[3] Alternatively, they assert that the New

[2] Northern New England Carpenters Health and Welfare Fund, New Hampshire Masons Health and Welfare Fund, New Hampshire Plumbers Health and Welfare Fund, New Hampshire Sheet Metal Workers #297 Health and Welfare Fund, New Hampshire Employers' Benefit Trust, and Northern New England Benefit Trust.

[3] The importance of the preemption issue is highlighted by the participation of the ERISA Industry Committee (ERIC) and the State of Minnesota as amicus curiae. The State of Minnesota recently enacted a comprehensive health insurance law which requires certain minimum health-care benefits. *See* Minnesota Comprehensive Health Insurance Act, Minn. Stat. Ann. Ch. 62E (West Supp. 1977). The State of Minnesota stresses the overall importance of the continued efficacy of state insurance laws, as recognized by § 514(b)(2)(B) of ERISA, 29 U.S.C. § 1144(b)(2)(B), and as required by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. ERIC, a nonprofit association of 80 major corporations who maintain group health plans covering nearly 7 million employees, joins the plaintiff administrators in urging that ERISA preempts state laws which directly or indirectly "relate" to employee welfare plans. Such a result is required, they believe, to avoid the substantial, adverse effects of concurrent federal and multiple state regulation of welfare benefit plans. The ERIC brief concludes with this comment:

> In the final analysis, the victims of a fragmented scheme of Federal and multi-state regulation of benefit plans are likely to be employees, themselves—the very persons intended to be benefited by plan regulation. Faced with mounting costs, unwieldy administration and vexatious litigation, at least some employers will undoubtedly terminate or curtail their employee welfare benefit plans; others, considering the adoption of such plans, will abandon the idea. Such a result would not only be directly contrary to the best interest of employees but also frustrate Congressional intent in adopting ERISA as a mechanism for encouraging the growth of employee benefit plans.

Hampshire statutory scheme is an undue burden on interstate commerce and violates the due process and equal protection clauses of the United States Constitution. Both parties filed motions for summary judgment. After an evidentiary hearing relating primarily to the issue of irreparable harm, the district court, the Honorable Hugh H. Bownes presiding, held that ERISA did not preempt state regulation of group insurance policies, and that Chapter 57 did not contravene any provision of the Constitution. We affirm.

I.

ERISA.

As the preamble to the Act indicates,[4] ERISA is the re-

[4] Section 2 of ERISA states:

> (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been

sult of a congressional endeavor to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards. Title I of ERISA, composed of five main subparts, provides the substantive regulatory provisions governing two basic types of employee benefit plans. Those two types are *pension* plans, which provide for retirement or deferred income,[5] and *welfare* benefit plans, which provide medical, health, sickness, accident, and other non-pension benefits.[6]

Part one of Title I[7] deals with the reporting and disclosure requirements for both types of plans. The basic purposes of these requirements are to inform employees of their rights, and to assist the Secretary of Labor in determining the financial soundness of the plan. *See* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA,* 62 Iowa L. Rev. 57, 61-62 (1976). Thus, the fund administrators are required to provide each participant and each beneficiary with a summary description of their plan drafted in language understandable by the average plan participant[8] and to make available a copy of

accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(a) - 1001(b).

[5] 29 U.S.C. § 1002(2).

[6] 29 U.S.C. §1002(1).

[7] 29 U.S.C. §§ 1021-31.

[8] 29 U.S.C. § 1022(a)(1).

the plan's annual report.[9] A copy of the information provided to participants and beneficiaries, as well as other data, must be furnished to the Secretary of Labor.[10]

Parts two[11] and three[12] of Title I are limited in that they apply only to pension benefit plans. Part II creates minimum vesting standards and participation requirements while part three provides funding requirements.

Part four[13] of the Title sets forth the fiduciary standards for the management of employee pension and welfare benefit plans. These standards provide in part that the plan be in writing,[14] the assets held in trust[15] exclusively for the benefit of employees,[16] and that the plan investments be diversified.[17] A "prudent man" standard is established for fund administrators, and prohibited financial transactions are listed.[18]

Finally, part five[19] contains the administrative and enforcement provisions which apply to both employee pension plans and welfare benefit plans. It creates broad criminal and civil penalties[20] and sets forth general guidelines governing claims procedures.[21] Part five also gives the Secretary of Labor broad investigative powers[22] and authority to promulgate regulations.[23]

[9] 29 U.S.C. § 1023(a)(1)(A).

[10] 29 U.S.C. § 1021(b).

[11] 29 U.S.C. §§ 1051-61.

[12] 29 U.S.C. §§ 1081-86. For further discussion of subpart three see Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 62-63 (1976).

[13] 29 U.S.C. §§ 1101-14.

[14] 29 U.S.C. § 1102(a)(1).

[15] 29 U.S.C. § 1103(a).

[16] 29 U.S.C. § 1104(a)(1)(A)(i).

[17] 29 U.S.C. § 1104(a)(1)(C).

[18] 29 U.S.C. §§ 1104(a)(1)(B), 1106.

[19] 29 U.S.C. § 1131-44.

[20] 29 U.S.C. §§ 1131-32.

[21] 29 U.S.C. § 1133.

[22] 29 U.S.C. § 1134.

[23] 29 U.S.C. § 1135.

II.

The "Funds".

The funds administered by plaintiffs are employee welfare benefit plans within the meaning of § 3 of ERISA.[24] All of the funds, with the exception of New Hampshire Employer's Benefit Trust, are "Taft-Hartley Trusts" in that they are also regulated by § 302 of the Labor Management Relations Act.[25] Also with the exception of New Hampshire Employer's Benefit Trust, which is voluntarily operated by employees, the funds are the products of collective bargaining agreements that require employers to contribute at a specified level. While the level of contributions is specified by the collective bargaining agreements, benefits are not.

Each year the fund administrators meet with local unions to determine the types of coverage desired by the members. The fund administrators must obtain, at the least possible cost, the coverage chosen. To fulfill this obligation the fund administrators, with the aid of insurance consultants, put together packages upon which they request sealed bids from insurance companies. Although the funds are self-insurers on a few benefits, approximately 90 per cent of the benefits are provided through group insurance policies. However, for all practical purposes, under the group insurance policies the funds are self-insurers who retain the insurance companies to provide the administrative service of processing claims.[26] Because the pre-

[24] 29 U.S.C. § 1002(1).

[25] 29 U.S.C. § 186(c).

[26] In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Supreme Court made a similar observation concerning General Electric's "Weekly Sickness and Accident Insurance Plan:"

> With respect to the Plan, General Electric is, in effect, a self-insurer. While General Electric has obtained, for employees outside California, an insurance policy from the Metropolitan Life Insurance Company, this policy involves the payment of a tentative premium only, subject to adjustment in the light of actual experience. Pretrial Stipulation of Facts, ¶ 11. In effect, therefore, the Metropolitan Life Insurance Company is used to provide the administrative service of processing claims, while General Electric remains, for all practical purposes, a self-insurer.

429 U.S. at 129 n. 3.

miums are experience rated the amount of claims for the year is projected; if the actual amount of claims is higher than the projection, the premium is adjusted upward; if the actual amount of claims is lower than the projection, the premium is adjusted downward. So in the long run, the funds reimburse the insurance company for all claims.

III.

A. *The Preemption Issue.*

The preemption issue is raised by § 514 of ERISA[27] which provides that all state laws that "relate to" employee benefit plans are superseded.[28] This sweeping language is modified by a saving clause which reaffirms the authority of the states to regulate insurance.[29] However, the saving clause is further limited in that no plan will be "deemed" to be an insurance company, insurer or engaged in the business of insurance for the purpose of any state insurance law.[30]

[27] 29 U.S.C. § 1144.

[28] Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall *supersede* any and *all* State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . .

29 U.S.C. § 1144(a) (emphasis added).

[29] Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from *any law of any State which regulates insurance,* banking, or securities.

29 U.S.C. § 1144(b)(2)(A) (emphasis added).

[30] Neither *an employee benefit plan* described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, *shall be deemed to be an insurance company or other insurer,* bank, trust company, or investment company *or to be engaged in the business of insurance* or banking *for purposes of any law of any State purporting to regulate insurance companies, insurance contracts,* banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B) (emphasis added).

Plaintiffs contend that § 514 preempts any *direct or indirect* regulation of employee benefit plans by the state.[31] They urge that Chapter 57 clearly "relates" to employee benefit plans and therefore the provisions of ERISA "supersede" Chapter 57 as it applies to them. On the other hand the Commissioner urges that no direct conflict between ERISA and Chapter 57 exists, and that the saving clause specifically preserves the efficacy of state regulation of insurance. The Commissioner finds support for his position in the McCarran-Ferguson Act,[32] which reflects a congressional policy to allow the states to regulate the business of insurance.[33]

B. *The New Hampshire Act.*

In resolving the preemption issue, it is first necessary to determine the scope of the New Hampshire statute. Chapter 57 applies to "each insurer that issues or renews any policy of group or blanket accident or health insurance"

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[31] In making this contention plaintiffs rely on the definitions of "State law" and "State" contained in § 514(c), which provides:

> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans* covered by this subchapter.

29 U.S.C. § 1144(c) (emphasis added).

[32] 15 U.S.C. §§ 1011-15. In particular, § 2(b) of the McCarran-Ferguson Act, provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance* . . . .

15 U.S.C. § 1012(b) (emphasis added).

[33] Section 514(d) of ERISA reaffirms the congressional policy set forth in the McCarran-Ferguson Act by providing:

> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d).

and "certificate holders of such insurance." The issue is whether employee welfare funds are insurers under the statute. In the event they are, we would have no difficulty finding explicit preemption by ERISA notwithstanding the saving clause.[34]

In determining the scope of Chapter 57 we are without the aid of a definitive New Hampshire state court interpretation. The state attorney general, without conceding its direct non-applicability to employee benefit plans, indicates that "Chapter 57 is not a disclosure law, and it does not purport to regulate benefit plans." The plaintiffs, on the other hand, assert that they are not "self-insurers," despite the fact that their insurance premiums are experience rated. Without further clarification we find that Chapter 57 was codified as an insurance law and specifically relates to insurers who issue certificates of insurance. Under a group insurance policy, a plan, as such, is really the "insured" and it does not issue certificates of insurance to its members. Under these circumstances we find there is no intention under Chapter 57 to directly regulate employee welfare plans as insurers.

This resolution, however, does not end our analysis. Plaintiffs further contend that Chapter 57 impermissibly regulates employee benefit plans by indirectly regulating the content of the group insurance policies which the funds purchase, and that ERISA preempts any indirect state regulation of employee benefit plans. The State of New Hampshire responds that ERISA was not intended to preempt any state law unless that law directly conflicts with or duplicates the regulatory provisions of ERISA.

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[34] As we will discuss, the preemption clause makes explicit that "all State laws" as they "relate" to "any employee benefit plan" are "superseded." Additionally, § 514(b)(2)(B) clearly removes an employee welfare plan from the application of the saving clause. *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977).

C. *Legislative History of § 514(a)*

We turn first to the state's argument. New Hampshire contends that Congress' use of the word "supersede" in § 514(a) indicates an intention to avoid regulatory vacuums created by displacing state regulation only in areas not principally covered by ERISA.[35] We disagree. The legislative history manifests that Congress intended to preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA.

The original versions of ERISA, both in the House and Senate, limited the scope of preemption to areas expressly covered by the bill. The House version listed the specific areas of federal regulation; the Senate version preempted all state laws which were related to the "subject matter" regulated by the bill.[36] However, during conference the language limiting preemption was replaced by the present sweeping preemption language. The conference committee

[35] This argument was made by Brummond. *See* Brummond, *supra*, 62 Iowa L. Rev. at 99.

[36] Section 514(a) of H.R. 2, 93d Cong., 1st Sess. (1973) provided:

> (a) It is hereby declared to be the express intent of Congress that, except for actions authorized by section 503(e)(1)(B) of this Act and except as provided in subsection (b) of this section the *provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies.*

120 Cong. Rec. 4742 (1974) (emphasis added).

Section 699(a) of the Senate version provided:

> (a) PRE-EMPTION OF STATE LAWS. — It is hereby declared to be the express intent of Congress that, except for actions authorized by section 694 of this title, the provisions of this Act or the Welfare and Pension Plans Disclosure Act *shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act.* . . .

120 Cong. Rec. 5002 (1974) (emphasis added).

report and the floor debates explain the reason for the change was to avoid "the possibility of endless litigation over the validity of State action that might impinge on Federal regulation . . . and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme."[37] Congress, therefore, clearly rejected a concept of preemption limited to conflicting or duplicate state law, in favor of applying the principle in its "broadest sense."[38]

Thus, we agree with plaintiffs that Chapter 57 is a state law which indirectly relates to employee benefit plans and is subject to preemption. However, we cannot agree that preemption necessarily follows. Chapter 57 is also a state law regulating insurance and is expressly exempted from preemption by § 514(b)(2)(A).[39] Any possible conflict between the state's regulation of insurance and the regulatory provisions of ERISA must be resolved by the application of the "deemer" clause, § 514(b)(2)(B).

D. *The "Deemer" Clause.*

The deemer clause simply provides that a state may not deem an employee benefit plan to be an insurance company, insurer, or in the business of insurance for the purposes of its insurance laws. Consequently, a state may not regulate an employee benefit plan simply because the plan serves as self-insurer on all of its benefits. Thus, the

[37] 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). *See also* H.R. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038; S.R. No. 93-1090, 93d Cong., 2d Sess. (1974); 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). For an excellent discussion of the legislative history see *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977).

[38] 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent).

[39] Section 514(b)(2)(A) provides that ERISA does not relieve any "person" from any state insuance law. 29 U.S.C. § 1144(b)(2)(A). Included within the definition of "person" are trusts created under such a plan.

deemer provision prevents a state from subjecting a plan, as a business of insurance, to the state's general insurance laws or enacting special legislation regulating plans as a "unique variety of insurance." *Hewlett-Packard Co.* v. *Barnes,* 425 F. Supp. 1294, 1300 (N.D. Cal. 1977). However, on its face the deemer provision does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans.

We are unable to accept plaintiffs' contention that the deemer provision forbids the states from indirectly affecting employee benefit plans by regulating group insurance. In order to accept plaintiffs' construction, we would have to construe § 514 without its saving clause pertaining to state regulation of insurance. This we cannot do; we must interpret the statute as written. Congress was fully aware of the functions and scope of employee benefit plans[40] and, nonetheless, exempted state laws regulating insurance from preemption. We also find that plaintiffs' suggested construction is not required by the definition of "State" as any state agency which "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." ERISA § 514(c)(2). Such a construction would completely emasculate the saving clause. It is our duty when interpreting an act of Congress to construe it in such a manner as to give effect to all its parts and to avoid a construction which would render a provision surplusage. *See, e.g., McDonald* v. *Thompson,* 305 U.S. 263 (1938); *Wilderness Society* v. *Morton,* 479 F.2d 842 (D.C. Cir. 1973), *cert. denied,* 411 U.S. 917 (1973).

The plaintiffs' interpretation would greatly diminish the state's primacy in regulating insurance. It would nullify all state insurance laws concerning group insurance when the group policy is issued to an employee benefit plan. We

[40] Congress defined an employee benefit plan as one providing benefits "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1).

do not find, absent a clear statement of intent, that Congress meant to so restrict a state's authority to regulate insurance. *Cf. United States* v. *Bass,* 404 U.S. 336, 350 (1971).

Our interpretation of the deemer restriction comports with the national policy of state primacy in the regulation of insurance announced by Congress in the McCarran-Ferguson Act.[41] Under that Act, the only congressional enactment which may "invalidate, impair, or supersede" any state insurance law is an act which "specifically relates to the business of insurance. . . ."[42] This national policy is twice reaffirmed by ERISA in § 514: first with the saving clause, and again with subsection (d).

We conclude that ERISA does not preempt application of state law to group insurance policies when such policies are purchased by employee benefit plans. The argument that the plans would be detrimentally affected and might face bankruptcy or extinction cannot change the plain meaning of ERISA. Assuming such detrimental consequences exist, we note that Congress fully intended to appraise the implementation of the Act and to provide remedial legislation where necessary.[43] In any event such arguments are not best directed to the courts.

[41] 29 U.S.C. § 1011-15. In the landmark decision of *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1868), the Supreme Court held that "[i]ssuing a policy of insurance [was] not a transaction of commerce." *Id.* at 183. However, in 1944 the Supreme Court reversed *Paul* v. *Virginia, supra,* in *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), holding that the business of insurance was interstate in nature. *Id.* at 539. The decision cast considerable doubt on the validity of the entire insurance regulatory mechanism. The McCarran-Ferguson Act dispelled the doubt, however, by reaffirming the ascendency of state regulation in insurance matters.

[42] 29 U.S.C. § 1012.

[43] An indication of this continuing concern was Congress' direction that a task force be formed to study and make a full report on "the effects and desirability of Federal preemption of state and local law with respect to matters relating to pension and similar plans. . . ." 29 U.S.C. § 1222(a)(4).

IV.

Other Issues.

We briefly review the appellants' remaining arguments. The fund administrators challenge the application of Chapter 57 to employee welfare funds claiming it to be preempted by the National Labor Relations Act and in contravention of the Constitution of the United States. We find no merit to these claims and, as did the district court, we dispose of them summarily.

Plaintiffs argue that Chapter 57, since it indirectly affects employee welfare funds, is preempted by general provisions of federal labor law. As we have indicated, Chapter 57 does not relate to employee benefit plans and is not intended to affect labor relations or disputes. The record demonstrates that benefits under any insurance plan are not part of the terms or conditions of collective bargaining agreements. Similarly, it has been held that state regulation of pension plans is not preempted by federal labor law. *White Motor Corp.* v. *Malone*, 545 F.2d 599 (8th Cir. 1976). State regulations of group insurance policies purchased by employee benefit plans are peripheral to any federal labor law other than ERISA.[44]

[44] The McCarran-Ferguson Act provides that no state insurance law is to be superseded by federal law unless that law specifically relates to the business of insurance. 29 U.S.C. § 1012. The Labor Management Relations Act, 29 U.S.C. § 141 et seq., is not a law that specifically relates to the business of insurance. The Labor Management Relations Act does place some restrictions upon so-called "Taft-Hartley Trusts" including a requirement that the trustees provide "fair and equal treatment." 29 U.S.C. § 186. Plaintiffs claim that this duty cannot be satisfied if Chapter 57 is upheld since union members in New Hampshire will be receiving disproportionate benefits. New Hampshire responds that this duty is satisfied when a trustee pays out a given *level* of benefits to employees which is relatively uniform, equitable, and which comports with the level of contributions; and that appellant has no obligation under 29 U.S.C. § 186 to provide the *same* type of benefits to all employees.

Plaintiffs additionally assert that Chapter 57 is an unconstitutional burden on interstate commerce. This claim is partially refuted by the fact that Congress fully intended in passing ERISA to retain regulation of insurance within the sphere of the state. There is no proof of any undue burden on commerce.

In *State Board of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), the Supreme Court held: "The power of Congress to grant protection to interstate commerce against state regulation or taxation [citations omitted], *or to withhold it* [citations omitted] is so complete that its ideas of policy should prevail." *Id.* at 456 (emphasis added and footnote omitted). The Court further noted that with the McCarran-Ferguson Act Congress "provided that the regulations and taxation of insurance should be left to the states, without restriction by reason of the Commerce Clause." *Id.* at 452.

Plaintiffs also challenge Chapter 57 on due process grounds. The district court found that New Hampshire law does not subject the fund administrators to any criminal penalty for noncompliance with Chapter 57. On this basis it determined that plaintiffs had no legal basis to attack the New Hampshire Act for vagueness. We agree. "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordon* v. *DeGeorge*, 341 U.S. 223, 230 (1951).

With regard to plaintiffs' equal protection argument, the district court found that, since they were not insurance companies, the plaintiffs lacked standing to challenge the New Hampshire Act as being in violation of the equal protection clause of the Constitution. We are hesitant to exclude plaintiffs' challenge on a finding of lack of standing. As Judge Stevens (now Mr. Justice Stevens) observed in *Cotovsky-Kaplan Physical Therapy Ass'n, Ltd.* v. *United*

States, 507 F.2d 1363 (7th Cir. 1975): "The test is not whether these plaintiffs are regulated by the statute but whether the interests asserted by them fall arguably within the zone of interests so regulated." *Id.* at 1366.

However, we need not decide the standing issue. Even assuming standing, we summarily hold that plaintiffs' argument that the statute denies equal protection since it discriminatorily favors Blue Cross-Blue Shield, to be without merit. *See Travelers Ins. Co.* v. *Blue Cross,* 481 F.2d 80, 86 (3d Cir. 1973).[45]

The judgment is affirmed.

[45] The equal protection issue was fully briefed and argued in both the district court and this court and was implicitly rejected by the district court. Thus, our decision is not contrary to the principle enunciated in *Singleton* v. *Wulff,* 428 U.S. 106 (1976), urging that appellate courts forego passing on constitutional issues not decided by the district court.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-266

JAMES M. DAWSON, Administrator of Northern New England Carpenters Health and Welfare Fund, New Hampshire Masons Health and Welfare Fund, New Hampshire Plumbers Health and Welfare Fund, New Hampshire Sheet Metal Workers #297 Health and Welfare Fund, and

BRUCE W. WADSWORTH, Administrator of New Hampshire Employers' Benefit Trust and Northern New England Benefit Trust,

v.

FRANCIS E. WHALAND, Commissioner, Department of Insurance, State of New Hampshire.

ORDER

Plaintiffs are administrators of employee health and welfare funds, all but one of which, the New Hampshire Employers' Benefit Trust, are "Taft-Hartley Trusts" established under 29 U.S.C. § 186(c).

The defendant, the State of New Hampshire, has recently enacted Chapter 57 of the Laws of 1976, RSA 415:18-a, 419:5-a, and 420:5-a, which mandates coverage of mental and nervous conditions in group health and accident insurance policies.

The plaintiffs claim that the New Hampshire statute violates the United States Constitution and that it is preempted by federal statutes in the instances of the Taft-Hartley Trusts.

The plaintiffs allege that several provisions of Chapter 57 violate the equal protection and due process provisions of the Fourteenth Amendment. The case is before this court on cross-motions for summary judgment.

In determining whether Chapter 57 violates the Equal Protection Clause, I must uphold the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *U. S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *San Antonia Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Turner* v. *Fouche,* 396 U.S. 346 (1970). "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Board of Retirement* v. *Murgia,* 44 U.S.L.W. 5077 (1976). I look to the character of the classifications in question, individual interests affected by classification, and governmental interests asserted in support of classification. *Dunn* v. *Blumenstein,* 405 U.S. 330 (1972). In doing so, I note that the exercise of the police power with regard to enforcement of health and insurance regulations is almost always upheld. *Cf. Hoopston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943); *Bourjois* v. *Chapman,* 301 U.S. 183 (1937); *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania,* 481 F.2d 80 (3d Cir. 1973); *cert. den.,* 414 U.S. 1093 (1973); *Iowa National Mutual Insurance Company* v. *City of Osawatomie, Kansas,* 458 F.2d 1124 (10th Cir. 1972); *Wissner* v. *Metropolitan Life Insurance Company,* 395 F.2d 204 (5th Cir. 1968); *Guest* v. *Fitzpatrick,* 409 F. Supp. 818 (E.D. Pa. 1976); *King* v. *Blue Mountain Forest Association,* 100 N.H. 212 (1956); *State* v. *Normand,* 76 N.H. 541 (1913). Justice Holmes stated with regard to the guarantees of the Fourteenth Amendment and the reservation of the police powers to the State:

> [W]e must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to make the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power. *Noble State Bank* v. *Haskell,* 219 U.S. 104, 110 (1911).

The question of standing always looms in the background of an equal protection claim. It is axiomatic that one does not have standing to assert the rights of another. *Tileston* v. *Ullman,* 318 U.S. 44 (1943). In order to satisfy the constitutional requirement for a case or controversy

> [t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240 (1937).

Plaintiffs also raise a vagueness issue under the due process claim.

1. *Residence and Place of Employment*

Plaintiffs complain that the statute discriminates against them by "compelling only those who are residents and have their principal place of employment in New Hampshire to procure mental health insurance . . . ."

Chapter 57:1(I) of the 1976 Laws states in pertinent part:

> Each insurer . . . shall provide to each group, or the portion of each group comprised of certificate holders of such insurance *who are residents of this state and whose principal place of employment is in this state,*

coverage for expenses arising from the treatment of mental illness . . . . (Emphasis added.)

The statute, far from discriminating, applies equally to all those within the jurisdiction. It is basic constitutional law that a state can only regulate as to those within its jurisdiction. While this may impose additional burdens on residents as opposed to those outside the jurisdiction, this is not a constitutional defect.

2. *Blue Cross-Blue Shield*

Plaintiffs complain that Blue Cross-Blue Shield is granted significant advantage over other insurers by Chapter 57:2(VI) of the Laws of 1976 which states:

> In the case of care and services rendered by licensed general hospitals, public or licensed mental hospitals, or community mental health centers which have not entered into a written contract with the hospital service corporation for the rendering of such care and services to its subscribers, benefits of not less than 75 percent of the benefits enumerated in paragraphs I, II, and III shall be provided.

The plaintiffs are not insurance companies, so, even if this provision does discriminate, they are not in a position to complain. If Blue Cross-Blue Shield is given a superior position as a result of this statute, the plaintiffs are free to do business with Blue Cross-Blue Shield. In short, plaintiffs do not have standing to raise this issue.

3. *Group Versus Individual Policies*

Chapter 57:1(I) of the 1976 Laws creates a statutory classification of "group or blanket accident or health insurance policies." The plaintiffs allege that it is unconstitutional to require purchasers of group insurance to purchase mental health insurance since there is no similar requirement for purchasers of individual policies.

The issue is whether there is a rational basis for the

mental health insurance requirement for purchasers of group insurance.

The State has determined that there is a grave need for mental health insurance but, because of the higher cost of individual policies, mental insurance benefits are more likely to be economically feasible in a group plan which can take advantage of group, rather than than national, actuarial statistics and the combined economic power of the group. This is clearly "a rational basis."

4. *Difference Between Billing Procedures for Psychiatrists and Psychologists from Other Physicians*

Plaintiffs complain that the billing procedures mandated for psychiatrists and psychologists are different from those of physicians and, therefore, unconstitutional. Plaintiffs are not physicians and do not have standing to raise this issue.

5. *First Dollar Charges*

Plaintiffs claim an equal protection violation by Section 1(III)(d) of Chapter 57 of the 1976 Laws which states:

> Benefiits for outpatient services under this paragraph need not be provided for the first or second visit providing such a limitation applies in the case of services for other illnesses, and benefits for outpatient treatment may be otherwise limited to not less than 15 full hours of treatment in any consecutive 12-month period.

Plaintiffs interpret this statute to mean that "first and second office visits must be paid unless there are at least 15 full hours of insured mental health treatment in any 12-month period." They contend that there is a distinction made between mental illness and other illnesses and that there must be a rational basis for this distinction. Although I do not concur with plaintiffs' interpretation of the statute, it is plain that the provision does make a distinction between

the two categories of illness. This is not a distinction that violates the Equal Protection Clause of the Fourteenth Amendment. The legislature, in its wisdom, has seen fit to give more protection to those with mental problems than those with physical problems. Perhaps they felt that those with physical problems already had adequate protection without further legislative intervention; perhaps they felt that the risk sharing element of insurance should be applied to mental illnesses because of the large expenses incurred by a victim and his family and the potential exposure of all families. In any event, there is a rational basis for this provision which falls within the police power of the State of New Hampshire.

6. *Vagueness*

The plaintiffs allege that Chapter 57 violates the Due Process Clause of the Fourteenth Amendment because it is unduly vague. They contend that NH RSA 400-A:15(III), which makes it a crime to violate rules, regulations or order of the Insurance Commissioner, applies to them.[1] It is not clear that this criminal statute applies to insurance

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[1] The statute is set out below.

400-A:15 Rules and Regulations; Violation.

I. The commissioner shall have full power and authority to make, promulgate, amend and rescind reasonable rules and regulations for, or as an aid to, the administration or effectuation of any provision or provisions of this title and such other rules and regulations as are reasonably necessary to implement the provisions of this title.

II. Prior to the adoption of any rule or regulation, or the amendment or repeal thereof, the commissioner shall publish or otherwise circulate notice of his intended action and afford interested persons opportunity to submit data or views either orally or in writing.

III. Any person who knowingly violates any rule, regulation, or order of the commissioner may, upon hearing, except where other penalty is expressly provided, be subject to such suspension or revocation of certificate of authority or license, or administrative fine not to exceed $2,500 in lieu of such suspension or revocation, as may be applicable under this title for violation of the provision to which such rule, regulation, or order relates.

statutes as opposed to rules. If it does, the violator would be the insurance carrier, not the plaintiffs here. Therefore, once again, plaintiffs do not have standing to sue.

7. *Impairment of Contract*

Plaintiffs allege that Chapter 57 impairs their constitutional right to contract. In *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965), the Court held that the constitutional prohibition against impairment of contracts is qualified by the measure of control which the states retain over remedial processes and that the states also have authority to safeguard vital interests of their citizens even if legislation appropriate to that end has the effect of modifying or abrogating contracts already in effect. That holding is directly on point here.

8. *Interstate Commerce and Preemption*

Plaintiffs' final constitutional claim is that Chapter 57 interferes with Congress' authority to regulate interstate commerce. This constitutional issue is much the same as the preemption issue. The question is whether Congress has chosen to preempt the field.

> [F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132 (1962).

All of the plaintiff trusts except the New Hampshire Employers' Benefit Trust are Taft-Hartley Trusts and subject to the various provisions of Title 29. Plaintiffs complain that Chapter 57 has been preempted on two separate bases: (a) it interferes with the congressional purpose in ERISA by fostering conflicting state laws; and (b) it is specifically preempted by statute.

(a) *Conflicting State Statutes*

The trusts in question here are subject to the provisions of 29 U.S.C. § 186. Subsection (c)(5) of that section provides that monies paid to the fund be used "for the sale and exclusive benefit of the employees of such employer, and their families and dependents . . . ." This language has been construed to require fair and equal administration by the fiduciaries of such funds. *Bey* v. *Muldoon*, 223 F. Supp. 489 (E.D. Pa. 1963).

The beneficiaries of the funds in this case are not all from New Hampshire. They are, therefore, not within the scope of Chapter 57. Plaintiffs assert that if Chapter 57 is followed for New Hampshire beneficiaries, then it must be followed for all beneficiaries. This not only extends New Hampshire jurisdiction beyond its territorial limit, but it runs the risk of conflicting with other jurisdictions which might have different insurance requirements.

This argument is flawed by a false premise. Plaintiffs have attempted a quantum leap by asserting that the requirement of fair and equal administration means that beneficiaries from different jurisdictions must all receive the same precise policies. There is no legal basis for this presumption. The evidence shows that employer and employee contributions to the funds are negotiated by the international unions and that the exact terms of the insurance contracts are chosen by the members of one or more locals. I don't doubt that the State of New Hampshire has created an additional burden for the administrators who may have to furnish two separate plans for the members of each local which is composed of employees from more than one jurisdiction, but Congress would not have knowingly preempted the insurance field without providing for it more specifically.

b. *Statutory Preemption*

Plaintiffs' other preemption argument is somewhat more direct.

Section 514 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144, preempts state laws that relate "to any employee benefit plan . . . ."

> [T]he provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . . 29 U.S.C. § 1144(a).

Employee benefit plans include both retirement funds and health and accident funds of the type which the plaintiffs administer. 29 U.S.C. § 1002(3).

To the sweeping preemption language, Congress created an exception:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. 29 U.S.C. § 1144(b)(2)(A).

Plaintiffs claim that there is an exception to this exception contained at 29 U.S.C. § 1144(b)(2)(B).

> Neither an employee benefit plan . . ., nor any trust established under such plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company, or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

There is little or no published legislative history surrounding the words in this subsection which help me interpret it.[2] Plaintiffs would have me read this language to

[2] I have reviewed the parts of the House, Senate, and Conference Reports which concern preemption as well as the hearings before the respective House and Senate Committees and the floor state-

preempt Chapter 57, but the plain meaning of the language is that states may not regulate employee benefit plans by calling them insurance companies. This more limited reading is bolstered by 15 U.S.C. § 1012(B).

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . . 15 U.S.C. § 1012(B).

ERISA is not primarily concerned with the regulation of insurance. ERISA is a broad act, the parts of which are important here deal almost exclusively with reporting provisions to ensure the financial health of employee benefit trusts. The remainder of ERISA deals mostly with tax aspects of retirement funds, contributions to them, and payments from them. Even without the exception for insurance regulation at 29 U.S.C. § 1144(b)(2)(A), the effect of 15 U.S.C. § 1012 is to except insurance regulation from preemption. The exception makes the intent not to preempt even clearer.

The New Hampshire statute imposes mental health insurance on those participating in group insurance plans. It neither seeks to nor in any way effects the administration of employee benefit plans. This decision is distinguished from the rulings in *Azzaro, et al* v. *Harnett,* C. 75-361 (S.D. N.Y. 1976), and *Hewlett-Packard Co.* v. *Barnes,* C. 76-1607 (N.D. Cal. 1976), because the state statutes in those cases were financial disclosure, quality control, and

ments of Senator Harrison Williams and Representative John Dent, Chairmen of their respective committees, and statements of other Congressmen. None of these addressed the question of preemption of substantive insurance statutes which regulate benefits, not financial or recording requirements. The complete lack of discussion of the effect of preemption of state regulations which concern actual insurance benefits aids in my conclusion that there was no preemption intended in this field.

general reporting statutes, not general insurance statutes regulating the form of benefits. They were designed to effect the administration and implementation of group plans and were directly preempted by ERISA.

Judgment is entered for the defendant on all counts.

So Ordered.

s/

Hugh H. Bownes

United States District Judge

February 11, 1976

Constitutional and Statutory Appendix

UNITED STATES CONSTITUTION

ARTICLE I, SEC. 8

The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . .

AMENDMENT XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

United States Code, Title 29

§1002(1):

The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pension).

§1144(a):

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee

benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

§1144(b)(2):

(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits, nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

N.H. REV. STAT. ANN. §415: 18a-(I) (1976):

Each insurer that issues or renews any policy of group or blanket accident or health insurance providing benefits for medical or hospital expenses, shall provide to each group, or to the portion of each group comprised of certificate holders of such insurance who are residents of this state and whose principal place of employment is in this state, coverage for expenses arising from the treatment of mental illnesses and emotional disorders. . . .

REQUIRED HEALTH-CARE BENEFITS
Source: Blue Cross Association Legal Affairs Bulletin

STATE	Alcoholism and/or drug abuse	Catastrophic Illness	Newborns	Continued Coverage	Physically handicapped & mentally retarded children	Complications of preganancy	Maternity	Dental Care	Out-of-hospital	Mental and/or nervous disorders	Preadmission testing and/or second opinions	Treatment by psychologists and/or social workers
Alabama			x									
Alaska			x									
Arizona			x	x				x	x			
Arkansas			x		x	x						
California			x	x	x	x				x		
Colorado	x		x		x		x			x		
Connecticut	x	x	x						x	x		
Delaware			x		x							
Florida			x	x					x	x		
Georgia												
Hawaii	x	x	x		x							
Idaho			x		x							
Illinois	x		x	x	x					x		
Indiana			x		x							
Iowa	x				x							
Kansas												
Kentucky			x									
Louisiana	x		x							x		
Maine			x		x		x		x			
Maryland	x						x		x	x		x
Massachusetts	x		x	x	x					x		
Michigan			x		x							
Minnesota	x	x	x	x	x		x		x	x	x	
Mississippi	x				x							
Missouri	x		x				x		x			

REQUIRED HEALTH-CARE BENEFITS
Continued

	Alcoholism and/or drug abuse	Catastrophic Illness	Newborns	Continued Coverage	Physically handicapped & mentally retarded children	Complications of pregnancy	Maternity	Dental Care	Out-of-hospital	Mental and/or nervous disorders	Preadmission testing and/or second opinions	Treatment by psychologists and/or social workers
Montana												
Nebraska			x	x								
Nevada	x		x			x			x			
New Hampshire			x		x					x		
New Jersey	x		x	x	x				x			
New Mexico			x		x							
New York			x	x	x		x		x	x	x	
North Carolina			x		x							x
North Dakota	x									x		
Ohio			x	x	x				x			x
Oklahoma			x	x								
Oregon	x		x				x			x		x
Pennsylvania			x		x							
Rhode Island		x										
South Carolina			x		x							
South Dakota	x		x									
Tennessee			x		x							
Texas			x									x
Utah									x			
Vermont			x						x	x		
Virginia	x		x							x		
Washington	x		x		x							
West Virginia			x							x		
Wisconsin	x		x									
Wyoming												

Supreme Court, U. S.
FILED
DEC 22 1977
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SUPREME COURT OF THE
UNITED STATES

October Term, 1977

BRUCE W. WADSWORTH, AD-
MINISTRATOR, ETC.

V.

FRANCIS E. WHALAND

No. 77-765

JAMES M. DAWSON, AD-
MINISTRATOR, ETC.

V.

FRANCIS E. WHALAND

No. 77-772

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of New Hampshire

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STATEMENT OF THE CASE

Petitioners in this case are the Administrators of six employee health and welfare funds, five of which are "Taft-Hartley Trusts" established under 29 U.S.C. §186 as amended, (Supp. 1975) through which employers are permitted to contribute to group insurance plans for employees under that statute. The Respondent, the New Hampshire Insurance Commissioner, is responsible for implementation of the state's new mental health law, Chapter 57 of the Laws of 1976 of the State of New Hampshire [codified in RSA 415:18-a, 419:5-a and 420:5-a (hereinafter "Chapter 57")]. Chapter 57 provides for coverage of mental and nervous conditions in certain group health and accident insurance policies.

Petitioners brought suit in the

United States District Court for the District of New Hampshire seeking temporary and permanent injunctive relief and requesting a declaratory judgment under 28 U.S.C. §2201 (1970) that Chapter 57 is unconstitutional, and preempted by both Section 514 of the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. §1144 (Supp. 1975) and Section 302 of the National Labor Relations Act, 29 U.S.C. §186 (Supp. 1975). They asserted jurisdiction under 28 U.S.C. §§1331 and 1343(3) (1970).

On December 22 and 23, 1976, the District Court heard evidence on Petitioners' motion for preliminary injunctive relief. Subsequently, cross-motions for summary judgment were filed together with supporting affi-

davits. On February 11, 1976, the District Court handed down its decision ordering that judgment be entered for Respondent based on its finding that the state law under attack was neither unconstitutional nor preempted by ERISA. Petitioners appealed the District Court's decision to the United States Court of Appeals for the First Circuit, and in so doing, shifted their emphasis from the constitutional claims to the preemption issue. On September 1, 1977, the First Circuit handed down its decision affirming the ruling of the District Court. Petitioners have filed timely Petitions for Writ of Certiorari.

ARGUMENT

The doctrine of federal preemption established by the line of cases dating back to the watershed decision of this Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), is embodied in a two-part test. Preemption lies where state law is in clear conflict with applicable federal laws or where there is clearly discernible in a particular federal statute the intent on the part of Congress to preempt an entire field for exclusive regulation by the federal government. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

This bifurcated test is tempered

by an overlay based on the fundamental principles of federalism. While always acknowledging the federal government's overreaching authority under the Supremacy Clause, this Court has been solicitous of interests peculiarly local in nature and chary not to prevent states from acting within the limits of their sovereign powers in the absence of an explicit mandate from Congress. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); United States v. Underwriters Assn., 322 U.S. 533, 548-49 (1943); Patapsco Guano Co. v. North Carolina, 171 U.S. 345 (1898).

A. CHAPTER 57 IS NOT PREEMPTED BY ERISA: THERE IS NO CLEAR CONGRESSIONAL INTENT TO PREEMPT STATE INSURANCE LAWS INDIRECTLY AFFECTING EMPLOYEE BENEFIT PLANS, NOR IS THERE ANY CONFLICT BETWEEN THE TWO STATUTES

Nowhere has this Court's deference been greater than in the area of insurance law. As this Court stated in SEC v. Variable A. L. Ins. Co., 359 U.S. 65, 68, 69 (1959), "when the States speak in the field of 'insurance,' they speak with the authority of a long tradition. For the regulation of 'insurance,' though within the ambit of federal power, has traditionally been under the control of the States." See also Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1954); Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151, 157, 158 (1931).

The court-established deference to the states in the field of insurance was perpetuated by Congress in the McCarran-Ferguson Act, 15 U.S.C. §1011, et seq. (1970). That Act states:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.... 15 U.S.C.A. §1012. (Emphasis supplied.)

This Court has stated with some exactitude just what is meant by the "business of insurance" as Congress used that phrase in the Act:

> The relationship between insurers and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement [to be]

> the core of the "business of insurance." SEC v. National Securities, Inc., 393 U.S. 453, 460 (1968) (emphasis supplied).

The key to the preemption issue lies, of course, in the three subsections in Section 514 of ERISA which have been cited by Petitioners. Section 514(a) of ERISA, 29 U.S.C. §1144(a) provides, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan....

Section 514(b)(2)(A) of ERISA, 29 U.S.C. §1144(b)(2)(A), states:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

Section 514(b)(2)(B) of ERISA, 29 U.S.C. §1144(b)(2)(B), provides, in pertinent part, that an employee benefit plan shall not

> ...be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Petitioners consider these provisions in conjunction with Section 514(c)(2) of ERISA, 29 U.S.C. §1144(c)(2) which provides:

> The term "state" includes a state, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

It is Petitioners' contention that the purpose of the three subsections is as follows: under subsection (a) Congress vested the federal government with the exclusive power to regulate, directly or indirectly, employee benefit plans (in short, Petitioners claim that subsection (a) is a statement that Congress intended the federal government to occupy the entire field of employee benefit plan regulation); under subsection A Congress preserved the states' traditional supervisory authority over the insurance industry; finally under subsection B Congress sought to preclude state regulation of employee benefit plans by deeming such plans to be insurers for purposes of state insurance laws.

Petitioners claim that state in-

surance laws such as Chapter 57 which indirectly affect employee benefit plans to the extent that they apply directly to insurers with whom such plans do business, are preempted by Section 514 of ERISA. Petitioners attempt to circumvent the McCarran-Ferguson Act by arguing that ERISA specifically "relates to the business of insurance" under that Act and therefore may supersede state insurance law.

Respondent, on the other hand, submits that ERISA does not specifically relate to the "business of insurance" within the meaning of McCarran-Ferguson. ERISA, rather, relates to the management, funding and control of employee benefit plans. The enactment of ERISA was set against a backdrop of mismanagement and abdication of fiduciary ob-

ligations; its object was to eliminate such abuses. See generally Hutchinson, The Federal Prudent Man Rule Under ERISA, 22 Vill. L. Rev. 15, 21 (1976). Like the Securities Act of 1933, 15 U.S.C. §17-a, et seq. (1970), ERISA is primarily a disclosure law and does not relate at all to the actual substantive benefits offer in employee benefit plans. Nowhere in ERISA is there any statement that the statute was intended to relate to the business of insurance or that it does in fact relate to that business. Nowhere is there any direct conflict between Chapter 57, which regulates the substantive content of insurance policies, and any of the provisions of ERISA. In view of the deference traditionally accorded the states by the judiciary on matters involving insurance, and in the

absence of an explicit statement that ERISA preempts state insurance laws which indirectly affect employee benefit plans, preemption should not be found to lie. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973).

Petitioners hold up the decisions in Marshall v. Chase Manhattan Bank, 558 F.2d 680 (2d Cir. 1976) and in Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977) as examples of decisions in other jurisdictions that conflict with those entered by the courts below. But there is no similarity between either of those decisions and the case at bar. In

Marshall a bank which was the trustee of an employee pension benefit plan of a bankrupt corporation sought an accounting and sought to wind down the plan in state court. The Second Circuit found that the federal courts had exclusive jurisdiction over such actions under 29 U.S.C. §1132(e)(1).

In Hewlett-Packard the District Court for the Northern District of California was confronted with the question whether the California Knox-Keene Health Care Service Plan Act of 1975, Cal. Health & Safety Code §1340, et seq. (hereinafter the "Knox-Keene Act") was superseded under Section 514 of ERISA. The Knox-Keene Act, like ERISA, was by its own terms applicable to "health care service plans," (Cal. Health & Safety Code §1345(f); see

also Hewlett-Packard, supra, at 1295-96). Like ERISA, the California Act was primarily a disclosure law; its requirements were in direct conflict with those of the federal law. So long as both statutory schemes were in effect, employee benefit plans in California were subjected to two complex and duplicatory reporting requirements. The California Court held that Section 514(a) of ERISA preempts "a state statute such as Knox-Keene insofar as it seeks to regulate ERISA-covered employee benefit plans," Hewlett-Packard, supra, at 1297.

There is no conflict between these, or any other decisions cited by Petitioners, and the First Circuit's decision in this case that a state law which relates to the content of group

insurance policies, which imposes substantive requirements directly only upon insurance companies, and which does not purport to and does not in fact impose direct regulation on employee benefit plans is not preempted by ERISA.

B. CHAPTER 57 IS NOT PREEMPTED BY GENERAL PROVISIONS OF FEDERAL LABOR LAW: THE PREEMPTION DOCTRINE OF LABOR LAW IS INAPPLICABLE

Petitioner Wadsworth asserts that if Chapter 57 is not preempted by ERISA then it is preempted under the general principles of preemption applicable in the context of federal labor law. But the doctrine of preemption as developed in labor law has no application here. The doctrine is a narrow one; it pertains to the jurisdiction of the National Labor Relations Board in cases involving conduct in the course of labor disputes which, in turn, relates to the fundamental objective of Congress of promoting collective bargaining. See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1338 (1972).

The preemption doctrine in labor

law is bottomed on the principle that the NLRB has preemptive authority to determine whether conduct is protected under Section 7 of the National Labor Relation Act, 29 U.S.C. §157 (1970), proscribed as an unfair labor practice under Section 8 of the Act, 29 U.S.C. §158 (1970), or whether it falls between the two sections. See Lesnick, Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Colum. L. Rev. 469, 472 (1972).

This Court has long recognized that the primary responsibility for interpreting and applying the principles of federal labor law lies within the preemptive authority of the NLRB and that the consistent construction of the federal labor law is of paramount importance. See Garner v. Teamsters

Local 776, 346 U.S. 485, 490-91 (1953). See also Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); cf., Youngdahl v. Rainfair, 355 U.S. 131 (1957); Teamsters Union v. New York, N.H. & H.R. Co., 350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

But federal labor law clearly does not preclude all state laws which affect, directly or indirectly, the management-labor relationship. Preemption will not occur where state action involves matters of "peripheral concern" to federal law, San Diego Unions v. Garmon, 359 U.S. 243 (1959). As Professor Cox noted,

> ...Congress developed this special framework for self-organization and collective bargaining within a larger context of state law cre-

> ating rights of property, bodily security, and personality, preserving public order, and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute.... The likelihood that the collateral impact of such laws upon management or labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated. Cox, Labor Law Preemption Revisited, supra, at 1355-56 (emphasis supplied).

Respondent respectfully submits that a state insurance law, particularly one which pertains to the health and welfare of the state citizenry is not preempted by federal labor law.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed by Petitioners in this case be denied.

Respectfully submitted,

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Nos. 77-765 and 77-772

In the Supreme Court of the United States

OCTOBER TERM, 1977

BRUCE W. WADSWORTH, PETITIONER

v.

FRANCIS E. WHALAND

JAMES M. DAWSON, PETITIONER

v.

FRANCIS E. WHALAND

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of January 23, 1978, inviting the Solicitor General to express the views of the United States in these cases.[1]

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[1] These cases were decided by the district court in a single order on February 11, 1976 (No. 77-772, Pet. App. A-17 to A-26). The

QUESTION PRESENTED

Whether a New Hampshire statute requiring insurers who issue group health insurance policies to provide coverage for mental illness and emotional disorders is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) when such policies are purchased by ERISA-covered employee benefit plans.[2]

STATEMENT

1. Petitioners are administrators of a number of health and welfare funds providing benefits to participants and beneficiaries in New Hampshire and other New England states. The funds are employee welfare benefit plans within the meaning of Section 3(1) of ERISA, 88 Stat. 833, 29 U.S.C. (Supp. V) 1002(1) (Pet. App. A–6), and are subject to the coverage of that Act. The plans are funded by employer contributions; with the exception of one plan, the level of contributions is set pursuant to collective bargaining agreements. The court of appeals described the

court of appeals consolidated the cases and rendered its decision on September 1, 1977. The opinion of the court of appeals (No. 77–772, Pet. App. A–1 to A–16) is reported at 562 F. 2d 70. (References to "Pet. App." in this memorandum are to the Appendix in No. 77–772).

[2] Petitioner in No. 77–765 designates (but does not develop) questions pertaining to preemption under Section 302 of the National Labor Relations Act, 61 Stat. 157, as amended, 29 U.S.C. 186, constitutionally impermissible burdens on interstate commerce, and denial of equal protection (No. 77–765, Pet. 2–3). These contentions, rejected by both the district court and the court of appeals, are not addressed herein.

setting of benefits under the plans as follows (Pet. App. A–6 to A–7):

> Each year the fund administrators meet with local unions to determine the types of coverage desired by the members. The fund administrators must obtain, at the least possible cost, the coverage chosen. To fulfill this obligation the fund administrators, with the aid of insurance consultants, put together packages upon which they request sealed bids from insurance companies. Although the funds are self-insurers on a few benefits, approximately 90 per cent of the benefits are provided through group insurance policies.

2. A New Hampshire statute, Chapter 57 of the Laws of 1976, N.H. Rev. Stat. Ann. §§ 415: 18–a, 419: 5–a and 420: 5–a (hereafter "Chapter 57"), requires insurers issuing group health insurance policies to groups having members residing and employed in New Hampshire to include in such policies coverage for treatment of mental illness and emotional disorders.[3] The plans administered by petitioners have not heretofore provided such benefits to their participants and beneficiaries.

[3] N.H. Rev. Stat. Ann. § 415:18–a(I) (1976) provides in part: "Each insurer that issues or renews any policy of group or blanket accident or health insurance providing benefits for medical or hospital expenses, shall provide to each group, or to the portion of each group comprised of certificate holders of such insurance who are residents of this state and whose principal place of employment is in this state, coverage for expenses arising from the treatment of mental illnesses and emotional disorders * * *." Chapter 57 is reproduced in full at Pet. App. A–30 to A–38.

3. Petitioners filed suit in the District Court for the District of New Hampshire seeking declaratory and injunctive relief. They alleged, *inter alia,* that Chapter 57 is a law which "relates to" employee benefit plans within the meaning of Section 514(a) of ERISA, 29 U.S.C. (Supp. V) 1144(a), and is thus preempted under that section.[4]

The district court rejected petitioners' arguments and entered judgment for the respondent Commissioner of Insurance (Pet. App. A–17 to A–25). It held that Chapter 57 is a state law regulating insurance and thus is saved from preemption by Section 514(b)(2)(A) of ERISA, 29 U.S.C. (Supp. V) 1144(b)(2)(A).[5] Relying additionally on the language of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 15 U.S.C. 1012(b),[6] the district court found that Congress intended to except from preemption state laws which regulate insurance.

4. The court of appeals affirmed (Pet. App. A–1 to A–16). The court determined that Chapter 57 "was

[4] Section 514(a) provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). * * *"

[5] Section 514(b)(2)(A) provides: "Except as provided in subparagraph (B) [discussed at page 7–8, *infra*], nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

[6] 15 U.S.C. 1012(b) provides in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *."

codified as an insurance law and specifically relates to insurers,' not to employee benefit plans (Pet. App. A–9 to A–10).[7] The court held that although "Chapter 57 is a state law which indirectly relates to employee benefit plans, and is subject to preemption" (Pet. App. A–11),[8] it is saved from preemption by Section 514(b)(2)(A)[9] because it is a law which "regulate[s] insurance" (*ibid.*).

The court of appeals rejected petitioners' contention that a different result was required by Section 514(b)(2)(B) of ERISA, 29 U.S.C. (Supp. V) 1144(b)(2)(B),[10] which bars the states from deeming em-

[7] The court of appeals rejected the State's contention that ERISA preempts only state laws which actually conflict with ERISA (Pet. App. A–10; emphasis in original): "The legislative history manifests that Congress intended to preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA."

[8] Section 514(c)(2) of ERISA, 29 U.S.C. (Supp. V) 1144(c)(2), subjects to preemption under Section 514(a) any state law "which purports to regulate, directly or *indirectly*, the terms and conditions of employee benefit plans covered by this title" (emphasis supplied).

[9] See note 5, *supra*.

[10] Section 514(b)(2)(B) provides: "Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." Section 514(b)(2)(B), said the court, "does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans" (Pet. App. A–12).

ployee benefit plans to be insurers, or in the business of insurance, in order to regulate such plans under the savings provision in Section 514(b)(2)(A). To accept that contention, the court stated, "we would have to construe § 514 without its savings clause pertaining to state regulation of insurance. This we cannot do; we must interpret the statute as written" (Pet. App. A–12).

DISCUSSION

1. The court of appeals correctly interpreted Section 514 of ERISA and properly applied it to the facts of this case. There is no conflict with the decision of any other court of appeals, and review by this Court is not warranted.

Chapter 57 is a state law requiring insurers to include coverage for mental illness and emotional distress in any group health insurance policy they issue. As the court of appeals correctly determined, employee benefit plans are not insurers and thus are not directly subject to Chapter 57.

The court of appeals recognized, however, that Chapter 57 indirectly regulates employee benefit plans (and all other insureds) by limiting the choices available to them if they choose to buy insurance. Because Section 514(c)(2) subjects to preemption even those state laws which indirectly regulate plans, the court of appeals found that Chapter 57 would be subject to preemption. At this point, however, Section 514(b)(2)(A) comes into play; that subsection saves from preemption any state law which "regulates insurance."

This savings provision would be meaningless unless it saved from preemption state laws regulating insurance which also indirectly regulate employee benefit plans, since no other state law regulating insurance would be subject to preemption under the Act even in the absence of the savings provision. Chapter 57 obviously "regulates insurance," and thus the court correctly found that Congress intended that law and others like it to remain effective regardless of ERISA's otherwise broad preemption of state laws relating to plans.

Congress, however, did not wish the broad exception it had created for regulation of insurance to swallow up the prohibition on the regulation of employee benefit plans. It therefore provided in Section 514(b)(2)(B), 29 U.S.C. (Supp. V) 1144(b)(2)(B), that no state could deem an employee benefit plan to be an insurance company, or to be engaged in the business of insurance, for purposes of "regulating" insurance. This "deemer" clause simply prohibits the states from doing through their insurance laws what Congress has prohibited them from doing through other laws. It does not, as the court of appeals recognized, prohibit a state from regulating bona fide insurers (as Chapter 57 does) when those insurers do business with employee benefit plans. If it did, "[i]t would nullify all state insurance laws concerning group insurance when the group policy is issued to an employee benefit plan" (Pet. App. A–13). There is no evidence that "Congress meant to so re-

strict a state's authority to regulate insurance" (*ibid.*). The fact that the purchaser of insurance is an employee benefit plan is immaterial; Congress did not intend to confer any special exemption or privilege on them as insurance buyers. Insurance sales to them must conform to the same rules as those to any other insurance buyer, and if a state determines, as New Hampshire has done here, that all group health insurance sold in the state must provide coverage for mental and emotional disturbance, the plans may purchase no other.

2. The petitioners expose no error in the reasoning of the court of appeals or in its interpretation of Section 514. Instead they broadly seek "[a] final resolution of the ERISA preemption issue" (No. 77–772, Pet. 4) and ask this Court to "settle the conflict" which allegedly exists "between state regulators and the Department of Labor" (No. 77–765, Pet. 18).[11] They urge that "A ruling to the effect that all state laws are preempted from application to employee benefit plans would insure a uniformity of regulation for employee benefit plans across the country" (No. 77–772, Pet. 4).

[11] As this memorandum demonstrates, there is no conflict between state regulators and the Department of Labor on the question presented by this case. The administrative opinions cited by petitioner in No. 77–765 (Pet. 14–15) concern state laws which attempted to regulate benefits the plans themselves provided to beneficiaries. Chapter 57 does not regulate such benefits. Any plan which chooses to become a self-insurer in New Hampshire may dispense with mental illness coverage, because Chapter 57 requires only that insurers provide such coverage to group insureds. A state law attempting to prescribe the coverage which plans must provide their participants would not be a law "regulating insurance" and would be preempted by ERISA.

The difficulty with this approach is that, contrary to petitioners' contention, there is no single "ERISA preemption issue" where state laws regulating insurance are concerned. Congress guaranteed that there would be no single preemption issue under ERISA when it saved insurance laws from preemption. Rather, each case must be decided on its facts, and the courts are doing that job as Congress intended. Congress preserved authority in the states to regulate insurance, and if petitioners find the result burdensome their recourse is to Congress, or to the state legislatures, rather than to this Court.

The decisions cited by petitioners as conflicting with the decision in this case (No. 77–765, Pet. 18–20; No. 77–772, Pet. 5–6) are not in conflict. Those decisions examine ERISA preemption of state laws in a variety of legal and factual contexts, but there is no decision that a state law requiring insurers to provide certain coverage is preempted by ERISA, nor is there any pending litigation which raises that question, as far as we are aware.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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